No. 3911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH
(a corporation),
Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,
Defendants in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

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Statement of Facts.

Complaint was filed in the District Court on the 16th day of January, 1922. The facts, constituting plaintiff's cause of action against the defendants, as alleged in the complaint are in substance as follows: On the 25th day of November, 1919, in the Circuit Court of the State of Oregon for Sherman County, First National Bank of Antioch, the plaintiff in error, herein, commenced an ac-

tion at law against H. B. Thornberry to recover from him the sum of $12,906.08 with interest and costs, and for the further sum of $1660 attorneys fees, upon contract for the direct payment of money. On said 25th of November, 1919, a writ of attachment was issued out of said court, in said action, and on said day the sheriff of Sherman County, Oregon, levied upon all of the real property of said H. B. Thornberry in said Sherman County, Oregon, viz.: upon about 2000 acres of farm land.

On the 17th day of January, 1920, said H. B. Thornberry, having appeared in said action, applied to the Court for a release and discharge of the said attachment and delivered to the judge of said Court and filed in said action, a bond or undertaking duly executed by all the said defendants in error herein. This undertaking was conditioned as follows:

> "Whereas, P. H. Buxton, Sheriff of Sherman County, Oregon, by virtue of a writ of attachment issued in said court and cause, has attached certain property of defendant's, to wit, all the real property owned by the said defendant in said Sherman County, Oregon, and said defendant having applied to the said Court, upon due notice to the plaintiff, for an order to discharge said attachment and to release said property from the lien thereof, in compliance with sections 310 and 311, Lord's Oregon Laws:
>
> Now, therefore, in consideration of the premises, and for the purpose of the making of

said order, we, the undersigned, H. B. Thornberry, as principal, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer and W. N. Morse, residents and freeholders in said County and State, as sureties, undertake, on behalf of defendant, and are bound to the plaintiff in the sum of $15,000.00, and promise the plaintiff that, in case the plaintiff recover judgment in said action, the defendant will, or in default thereof, we, his sureties, will, on demand, pay to the plaintiff the amount of the judgment that he may recover against the defendant in said action, not exceeding the amount of $15,000.00 and the costs and disbursements of said action."

Upon the giving and filing of said bond or undertaking the attachment upon the real property of the defendant, H. B. Thornberry was released and discharged.

On January 12, 1922, plaintiff recovered judgment against said Thornberry in said action for the sum of $13,902.50. Thereafter, plaintiff demanded payment of said judgment from the defendants in error, sureties on said bond or undertaking, but payment was refused by them.

Plaintiff prayed for judgment against said sureties in the said sum of $13,902.50, together with interest and costs.

The defendants in error filed a demurrer to plaintiff's complaint, specifying the following grounds of demurrer, to wit:

(a) That the court has no jurisdiction of the person of the defendants, or the subject of action.

(b) That the plaintiff has not legal capacity to sue.

(c) That the complaint does not state facts sufficient to constitute a cause of action.

On the 10th day of April, 1922, the judge of said District Court sustained defendants' demurrer to plaintiff's complaint, upon the ground that the bond, having been sufficient for the state Court to order the release of the property of Thornberry from the lien of the attachment, that, therefore, it was an undertaking upon which judgment, under Section 308, Oregon Laws, could have been given against the sureties, at the time of the giving of judgment against Thornberry, in the action, and that plaintiff having failed to take judgment against said sureties at the time of the entry of judgment against Thornberry, it lost its right to demand, in any Court, judgment against the said sureties upon said bond or undertaking, and a judgment dismissing this action was entered.

(Transcription of the oral opinions of the District Judge are printed in an appendix hereto.)

The order sustaining defendants' demurrer to plaintiff's complaint, and the judgment dismissing this said action, plaintiff contends to be grievous error, and that the demurrer to plaintiff's complaint should have been overruled.

ERRORS ASSIGNED.

The plaintiff's formal assignments of errors may be condensed into two propositions:

(1) That the District Court erred in holding the bond in question to be such a compliance with the provisions of Section 311, Oregon Laws, as to have justified the Court wherein the same was filed, to have entered judgment against the sureties at the time of entering judgment against Thornberry under the provisions of Section 308, Oregon Laws, and that plaintiff's only remedy was by judgment against the sureties under Section 308, Oregon Laws.

(2) That the District Court erred in holding that if the bond in question was in compliance with said Section 311, the plaintiff did not have the right to pursue its remedy, either under Section 308, Oregon Laws, or by action on the bond, as a common law obligation.

POINTS AND AUTHORITIES SUPPORTING THE FIRST PROPOSITION.

Oregon Laws, pertaining to the discharge of an attachment and to the entry of judgment against sureties upon undertaking to discharge attachments, are as follows:

> "Section 310. MOTION TO DISCHARGE ATTACHMENT. Whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court or judge where the

action is pending, or to the clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in the next section; and if the application be allowed, all the proceeds of sales, and property remaining in his hands, shall be released from the attachment and delivered to the defendant, upon his serving a certified copy of the order on the sheriff.

Section 311. Undertaking Upon Application to Discharge Attachment. Upon such application, the defendant shall deliver to the court, or judge to whom the application is made an undertaking, executed by one or more sureties, resident householders or freeholders of this state, to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. If the plaintiff demand it, the sureties shall be required to justify in the same manner as bail upon an arrest.

Section 308. Order Shall Direct Sale of Attached Property, When. If judgment is recovered by the plaintiff, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if there be any such property or proceeds remaining after satisfying such execution, he shall, upon demand, deliver the same to the defendant; or if the property attached shall have been released from attachment by reason of the giving of the undertaking by the defendant, as provided by section 311, *the court shall upon giving judgment against the defendant or*

> *defendants also give judgment in like manner and with like effect against the surety or sureties in such undertaking."*

The undertaking in this action was accepted by the Court and upon the filing thereof the attachment was discharged. It by no means follows from this that it was such an undertaking upon which judgment could have been entered against the sureties at the time judgment was entered against Thornberry.

The form required for the undertaking provided for in Section 311, is

> "to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action."

The sureties, in the undertaking herein, in consideration of the release and discharge of the lien of the attachment,

> "promise the plaintiff that in case plaintiff recover judgment in said action, the defendant will, or in default thereof we, his sureties will, ON DEMAND, pay to plaintiff the amount of the judgment he may recover against the defendant in said action, not exceeding the amount of $15,000.00."

The sureties by their undertaking in this action contracted to pay the judgment entered against Thornberry upon two conditions: (1) upon his default in the payment thereof, and, (2) after demand had been made upon them for the payment of the judgment entered against Thornberry.

"Sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption. This rule is followed both at law and in equity. Construction in favor of the surety should not, however, be carried to the length of giving the contract a forced and unreasonable construction with the view of relieving him."

32 Cyc. 73.

"As against sureties no implications are to be made in giving construction to the terms of a bond not clearly embraced within the language used, for it is well settled that sureties are only chargeable according to the strict terms of the bond."

9 C. J. 32.

"Sureties are favorites of the law, and are not bound beyond the strict terms of the engagement; that their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissima juris.*"

Graeter v. De Wolf (Ind.), 13 N. E. 111.

The editor of the L. R. A. (N. S.), in note under the case of First National Bank of Waterloo v. Story, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154, says:

"Few cases have been found where the question has been directly decided whether a demand is a condition precedent to an action upon a promise to pay on demand the debt of another and these have been followed in First National Bank v. Storey in holding a demand necessary."

In First National Bank v. Story, action was brought against the makers of a written instrument as follows:

> "We, the undersigned, do hereby jointly and severally for ourselves and our and each of our heirs, executors, and administrators, guarantee and warrant unto the said bank, its successors and assigns, the prompt payment at maturity of each and all the notes, checks, drafts, bills of exchange and other obligations in writing of every name and kind made, signed, drawn, accepted, or indorsed by the said Waterloo Organ Company, which the said bank now has, or which it may hereafter have, hold, purchase, or obtain within one year from date hereof; but our liabilities hereunder shall not at any time exceed the sum of $15,000.00 and interest thereon. And in case default is made in the payment at maturity of any of the above-mentioned obligations, or in the payment of any lawful claim or demand held by said bank against said company, we do hereby jointly and severally covenant, promise and agree to pay the same to the said bank, its successors, or assigns *upon demand.*"

No demand of payment was alleged or proved. After an extended and careful review of cases, Mr. Justice Vann, who delivered the opinion of the Court, said:

> "I think that when a promise is to pay one's own debt, on demand, none is required, because the law implies a promise to pay, and the express promise forms no part of the consideration and adds nothing to the obligation. When, however, the promise is not to pay one's own debt, but the debt of another yet to come into existence, on demand, there is no precedent duty, and the obligation to pay rests wholly

on the promise in the form made and the promise is binding only in the form made. As, according to the promise, nothing was payable except on demand, there could be no breach until demand made. 'When there is a duty which the law makes payable on demand, there need be none alleged, but otherwise where there is no duty until a demand.' To the contention that the obligor is not harmed in the one case more than in the other, because he can avoid liability for costs in the one the same as in the other, the obvious answer is that *he was not bound to pay at all except by his collateral promise, and he had the right to limit that promise by annexing any condition that he saw fit.*

I think upon principle as well as authority the following propositions should be announced as the law:

(1) When the promise is *to pay one's own debt* for a specified amount on demand, *no demand need be alleged or proved.*

(2) When the promise to pay on demand is not to pay one's own debt, *but is a collateral promise to pay the debt of another, a demand is necessary,* for it is part of the cause of action."

The Supreme Court of California holds to like effect in Pierce v. Whiting, 63 Cal. 538. It is there said:

"The case of Sicklemore v. Thistleton, 6 Maule & S. 9, illustrates the rule as to promise for payment of money to a third person. In that case the plaintiff declared upon a lease in which the defendant had, as surety for the tenant, covenanted 'that the tenant should at all times during his term, well and truly pay or cause to be paid to the plaintiff the rents as they became due, according to the terms of the lease, and that in case the tenant should neglect to pay

the rent for forty days, defendant shall pay on demand.' Speaking of the covenant of the surety Lord Ellenborough said: 'I own that I cannot help thinking this is a qualified covenant, and that the stipulation, that if the lessee shall neglect to pay for forty days, the surety shall pay on demand * * * does, in reasonable construction, pervade and restrain the former covenant. According to the authority of Browning v. Wright, 2 Bos. & P. 13, covenants ought to be construed with due regard to the intention of the parties, as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole. And it appears to me that that would not be a consistent or just construction of this instrument, which would have the effect of making the defendant, who is only a surety liable in the first instance, without notice, immediately upon the rent becoming due.' And Bailey, J., said: 'It is not possible that the latter clause, as it regards the surety, is a qualification of the former. Covenants must necessarily be construed all together in order to attain their true meaning. The meaning of these covenants is, that the defendant does not become chargeable *eo instanti* the rent becomes due, but only after forty days non-payment and *after demand made.*

If there is any principle of law well settled, it is that the liability of sureties is not to be extended beyond the terms of their contract. To the extent and in the manner and under the circumstances pointed out in their obligation they are bound, and no further; they are entitled to stand on its precise terms."

Section 308 of the Oregon Laws authorizes the judgment to be entered against the sureties when the bond is given *as provided in Section 311.* The

latter section contemplates a bond wherein the sureties promise to pay the judgment entered against the defendant. That is they must promise to pay that judgment *eo instanti* upon its entry. This promise and this alone can authorize the entry of the judgment under the powers given the Court by said Section 308 against the sureties. That this bond is not such a contract upon their part is apparent. The *demand* upon the surety was required to call into existence the obligation of the sureties to pay the judgment. Had the Court entered judgment against them at the time it entered judgment against Thornberry it would have entered a judgment against them which was baseless, no obligation whatsoever upon the part of the sureties could have arisen until there was a judgment against Thornberry, until he had defaulted, and until the demand had been made upon the sureties for the payment.

Section 308, Oregon Laws, provides for a drastic and summary remedy against the surety. Under its terms a judgment may be entered against him upon the entry of judgment against the defendant, even though the plaintiff may have committed some act between the time of the filing of the bond and the entry of the judgment, and not appearing of record, that would effectually destroy the obligation of the surety. Such judgment may be entered without notice to the surety. (McCargar v. Moore, 88 Or. 682, 157 Pac. 1107.) In this event, the property of the surety is charged with the lien of the judgment

until he may come into court, and, by appropriate motion or petition procure an order canceling and annulling the judgment.

> "Statutes authorizing summary remedies on forthcoming, delivery or dissolution bonds are to be strictly construed, and are available only where the bond is such as the statute contemplates."
>
> 6 C. J., par. 740, page 350.

In McCargar v. Moore, *supra,* the Supreme Court of Oregon recognizes the principle that the summary remedy provided by Section 308, does not impair the effect of any legal defense on the part of the surety.

The authorities heretofore cited clearly establish the rule that upon undertakings such as this, where a *demand* upon *the surety* is provided for by the terms of the instrument, that such demand *must* be made before his obligation on the bond accrues. In the absence of a statute such as said Section 308, a demand would have to be alleged and proved before an action on this bond would lie. The failure of the plaintiff to make the demand could be pleaded and proved by the sureties as a complete defense to an action on this bond. Judgment, therefore, could not have been entered by the State Court against these sureties at the time of the entry of the judgment against Thornberry, for, obviously, in so doing the State Court would have deprived them of a right specifically reserved to them by the terms of their contract, to-wit: the right to have a demand made upon them to pay the

judgment against Thornberry, before any obligation of theirs became due to the plaintiff or even came into existence. It would have deprived them of a right of such dignity as to have constituted a complete defense to the right of the plaintiff to have maintained an action on the bond in the absence of the statute in question.

The conclusion of the District Court that this bond is a statutory bond is based upon the decision of Ebner v. Heid, 125 Fed. 680. The bond there provides:

> "We, the undersigned, * * * in consideration of the premises and in consideration of the release from attachment of all the property attached as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake and promise that in case said plaintiffs recover judgment in said action, the defendant will, on demand, pay to the said plaintiffs the amount of said judgment, together with the costs and disbursements of this action."

Let us point out, that the decision in Ebner v. Heid was rendered long prior to the enactment of the provision in said Section 308 for the summary entry of judgment against the surety. Ebner v. Heid was decided September 14, 1903, and the provision for the summary remedy against sureties on dissolution bonds was enacted in 1907. At the time of the decision in Ebner v. Heid a plaintiff's only means of enforcing the obligation of the bond was by action at law. If the bond was not in accord with Section 311, it was good as a common law

obligation. The language of the Court in that decision to the effect that the bond there involved was a substantial compliance with the statute was unnecessary to the conclusion reached, and is *obiter dictum*. It was immaterial, there, whether or not the bond was in compliance with the statute. In either event, the attachment having been discharged, the sureties were liable to the plaintiff on the bond as a common law obligation, and the Court so held.

Again, the bond in Ebner v. Heid differs from the bond here in a very material particular. The former provides that *defendant* will, *on demand,* pay to the plaintiff the amount of the judgment, the latter that the *sureties will, on demand,* pay the amount of the judgment. The decisions heretofore cited clearly point out that where the bond provides that the principal will pay, on demand, a formal demand upon him is not necessary to fix the obligation, nor is such demand a prerequisite to the maintenance of an action, while in the case of a demand upon the sureties being provided for by the bond, such demand upon them is a necessary prerequisite to the fixing of the obligation of the sureties, a condition precedent to an action on the bond. Had the bond here involved only provided that Thornberry would pay, *on demand,* the bond might have been properly held to justify the summary entry of judgment against the sureties, but it does not so provide, and it does provide specifically for *a demand on the sureties.*

The defendants in error, by their contract, reserved to themselves a right, substantial and manifestly to their advantage, and one so recognized by competent authority. They clearly and expressly stated in the instrument their intent to reserve to themselves the right to have demand made upon them for, to have opportunity to make, payment of this judgment against Thornberry before any enforcible right should accrue to plaintiff. The State Court did not have power to deny them this right expressly reserved to them by the bond, by summarily entering judgment against them.

The decisions of our Courts must be viewed in the light of circumstances existing at the time of their rendition. The condition as exists in this case did not exist when Ebner v. Heid was decided. That decision is by no means an authority supporting the position of the District Court, that the bond in that case having been held sufficient to warrant the discharge of the attachment and subject the sureties to liability *in an action,* that the bond here, containing a vitally different condition is a sufficient compliance with Section 311 to have warranted the summary entry of judgment against the sureties here under the provisions of Section 308.

The principle of the decisions heretofore cited that a demand on the defendant is not a prerequisite to fixing the obligation of the sureties is recognized by Judge Morrow in the decision of Ebner v. Heid, wherein he says:

> "It is true, the agreement was that the defendant would on demand pay the judgment,

> if one was recovered in the action, but that is the equivalent to an agreement to pay the judgment if one was recovered against the defendant."

Very clearly, the promise of *the surety* to pay, *on demand,* is not equivalent to *a promise on his part to pay the judgment.*

The District Judge reasons, that since the bond was given for the purpose of obtaining a discharge of the attachment that it is in effect a statutory bond. It is true that it was given to release the attachment and that it was accepted by the State Court and the attachment was released. Section 311 provides that the bond shall be to the effect that the sureties will pay the judgment. It is plain that the bond may vary materially from this particular language and yet be sufficient to warrant the discharge of the attachment if it be accepted by the Court, particularly in the absence of objection by the plaintiff. Assume that a defendant made his motion in accordance with the provisions of Section 310 and offered a bond providing that in event plaintiff recovered judgment that the surety or sureties would pay the same thirty days, six months or one year after entry of the judgment against the defendant. Section 311 provides for a bond to the effect that they will pay the judgment. Clearly, this means that the sureties shall promise to pay the judgment immediately and without any condition precedent. Section 308 gives the Court power to summarily enter judgment against the

sureties only when the bond is as provided by Section 311. That is, when there is no condition precedent and the bond is an unqualified promise to pay the judgment entered against the defendant *eo instanti.* In the event of the promise of the sureties being conditional, as to the effect that they will pay the judgment thirty days, six months or one year after entry of judgment against the defendant, or after entry of judgment against the defendant and *upon demand* made upon them for the payment of that judgment, the Court may, in the absence of objection of plaintiff, accept the bond and order the attachment released and discharged. In such event the bond serves the purpose of discharging the attachment, but does not warrant the summary entry of judgment against the sureties. And we therefore submit, that the bond in this case was and is utterly and entirely insufficient to have warranted the State Court to have entered judgment against these sureties at the time it entered judgment against the defendant, Thornberry.

The complaint states a cause of action against the defendants upon their obligation and promise to plaintiff, for a valuable consideration, to pay the amount of the judgment, on demand, entered in favor of plaintiff and against Thornberry, upon the common law bond or undertaking set forth in the complaint, and the Court erred in sustaining defendants' demurrer thereto and in ordering the action dismissed.

It is true the undertaking states that it was given in compliance with Sections 310 and 311, Lord's Oregon Laws, yet we have heretofore pointed out that while it was sufficient in form for the Court's order dissolving the attachment, it was not such a compliance with the requirements of Section 311 as to give the State Court power or right to summarily enter judgment against the defendants at the same time judgment was entered against Thornberry, because the contract of the defendants with the plaintiff was, that in case Thornberry defaulted in the payment of the judgment, the defendants herein would *on demand* pay to the plaintiff the amount of the judgment. It was not defendants' intention, as expressed in the undertaking, that judgment should be so entered against them. No objection was made by plaintiff to the discharge of the attachment, in consideration of the undertaking as given by defendants. The attachment was discharged, and the consideration plaintiff received for the release of its attachment lien upon Thornberry's property was this undertaking, signed, sealed and delivered by the defendants, and constituting a common law bond. If it was intended that this bond should be a compliance with Section 311 and it was in fact not in compliance therewith, it is still valid as a common-law undertaking.

> "'Common Law Bonds' and 'Statutory Bonds' are to be distinguished in that the latter conform to a statute while the former do not, *although it so was intended.*"
>
> 9 C. J. 32;
>
> Mt. Vernon v. Brett, N. Y., 86 N. E. 6, 10.

In the case of Palmer v. Vance, 13 Cal. 553, the Court, at page 557, says:

> "The paper sued on is not a statutory undertaking, but being founded upon a sufficient consideration, is valid as a common law obligation for the payment of money. A bond taken by the sheriff is not void for want of conformity to the requirements of the statute, which, while prescribing one form of action, does not prohibit others; and a bond given voluntarily upon the delivery of property is valid at common law." (Whitsett v. Womack, 8 Ala. 466.)

In the case of Smith v. Fargo, 57 Cal. 157, 159, in passing upon the undertaking given to release property from attachment, under the laws of California, the Court said:

> "It was not a statutory undertaking, and cannot be held valid and binding as such. It was a common law bond, and if binding upon the sureties, it must be so under the principles of the common law. This question was before the court in the case of Palmer v. Vance, 13 Cal. 553, and it was there said (quoting the paragraph above set forth). In the case of Whitsett v. Womack, 8 Ala. 466, the Court says: 'Where a statute requires a bond to be executed in a particular form, and not otherwise, no recovery can be had on a bond professedly taken under the authority of the act, if it does not conform to it, but if the statute merely prescribes the form, without making a prohibition of any other, a bond which varies from it may be good at common law.' (See also, Seawell v. Cohn, 2 Nev. 311.)
>
> The bond declared upon was given voluntarily upon a sufficient consideration, and was good at common law, according to the above authorities."

It will be noted that Section 311 does not provide that the undertaking there provided for must be in the form as there set forth *and in no other form.*

The case of Gardiner v. Donnelly, 86 Cal. 367, 372, was an action upon an undertaking to procure the release of an attachment. It was given after the service of notice of motion under the provisions of Sections 554 and 555 of the California Code of Civil Procedure, the Court accepted and approved the bond, it was filed in the case and an order made releasing the attachment, precisely as was done in the case at bar. It did not conform to the statute. The Court said:

> "It was given for a purpose, which was accomplished when the order was obtained, and it then became binding on its makers as a common law obligation, and cannot now be repudiated by those who asked for and received its benefits."

In the case of Bunneman v. Wagner, 16 Or. 433, the Court held:

> "The principle is familiar that bonds intended to be taken in compliance with statutes, although not done so, if entered into voluntarily and founded upon a valid consideration, and do not violate public policy, or contravene any statute, will be enforced by common-law remedies."

The principle above announced in Bunneman v. Wagner, is cited with approval in the case of Port-

land v. Portland etc. Co., 33 Or. 317, the Court saying:

> "The rule is perhaps more tersely stated by the Supreme Court of the United States, that, if a contract is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. U. S. v. Tingley, 5 Pet. 115; U. S. v. Linn, 15 Pet. 290."

The case of Ebner v. Heid, 125 Fed. 680, was brought to recover on an undertaking given for the discharge of property from attachment. The undertaking was given in Alaska, under the provisions of 311 of the Oregon Laws and was conditioned and the sureties therein undertook and promised, "that in case said plaintiffs recovered judgment in said action, the *defendant* will, *on demand,* pay to the said plaintiff the amount of said judgment." Justice Morrow, who rendered the opinion of the Court, there said:

> "The undertaking appears also to be valid as a common-law obligation. As set forth in the record now before the Court, it is under seal, and recites as a consideration the release from attachment of all the property attached, and the discharge of the attachment. This was a sufficient consideration for the undertaking."

POINTS AND AUTHORITIES SUPPORTING THE SECOND PROPOSITION.

The conclusion of the District Court that, since the Supreme Court of Oregon has adopted the rule

that the failure to order the attached property sold at the time judgment against the defendant is entered discharges the lien of the attachment, it likewise must follow that the failure of the Court to enter judgment against the sureties at the time of entering judgment against the defendant discharges the sureties on the bond, is erroneous.

These decisions, following the provision of Section 308, viz:

> "If judgment is recovered by the plaintiff * * * and * * * property has been attached in the action * * * the court shall order * * * the property to be sold"

are in accordance with the well established rule that where a right or remedy rests wholly and entirely upon a statute, the statute will be strictly construed in directing the manner in which the right must be retained or the remedy enforced. Attachment proceedings are statutory. These statutes must be strictly followed. (Murphy v. Bjelik, 87 Or. 329.) The lien of an attachment is purely a creature of statutory birth; it was unknown to the common law. We think the Supreme Court of Oregon very properly held that the provision of Section 308 should be strictly followed if the lien of the attachment is to be preserved to the plaintiff. Vastly different, however, is the status of the liability of the sureties. While the attachment was in force the plaintiff had, to protect the judgment which it sought to recover, the lien upon the property; this lien was of purely statutory creation. When the attachment was discharged by the giving of the bond the plain-

tiff had, to protect the judgment, the promise of the sureties to pay the same. The latter liability is *not founded upon statute* but *upon the contract of the sureties.* The statute creates the lien of the attachment and fastens it upon the property attached. The bond, the *solemn written contract* of the sureties, their *promise,* that in consideration of the release of the attachment, they will pay any judgment the plaintiff recovers in the action is the foundation of their liability to the plaintiff. The rule that a remedy provided by statute must be strictly followed has no application to the liability of the sureties. It is true that the bond is a substitute for the attachment, but it is equally true that the attachment lien, the creature of the statute, is destroyed upon the giving of the bond, and that in its place and stead there is no longer a right resting upon statute, but a right accruing to plaintiff and an obligation fastened upon the sureties by *their own express contract.* The statutory lien has been replaced by a contractual obligation. The reasoning upon which the Supreme Court of Oregon bases its conclusion that the failure to order the attached property sold destroys the lien, viz: that the lien has been created solely by statute and that the statutory remedy must be strictly followed to preserve the *statutory lien,* by no means applies to the remedy provided to enforce the *contractual obligation* of the sureties. It, therefore, does not follow that the failure to enter judgment against the sureties is a waiver of recourse against them. The right to follow the lien of the attachment rests wholly upon the remedy pro-

vided by the statute, while the right to enforce the contractual obligation of the surety rests upon a broader and firmer foundation. This right, is founded, not upon statute but upon contract, and may be enforced by any appropriate remedy either given by statute or given by the ancient and honored principles and practices of the common law.

The soundness of the proposition that, since the bond is a substitute for the attachment, anything that destroys the lien of the attachment destroys the liability of the sureties, is denied by the Supreme Court of Oregon in Bunneman v. Wagner, *supra,* wherein it is said:

> "There are several assignments of error and among the first to be noted is whether the death of the defendant Dipascuale dissolved the attachment, and exonerated the defendant Wagner of his liability as surety upon the undertaking. This objection is founded upon the assumption that, when an undertaking is given it takes the place of the property released, but does not discharge the attachment; and that, when the defendant Dipascuale died thereafter, its effect was to dissolve such attachment, and consequently to relieve the defendant Wagner of his liability as surety on such undertaking. But the law is otherwise. When the undertaking was given, and the property was released, the bond did stand as security for the property, or took its place; but its effect was to dissolve the attachment. 'By giving the statutory bond', Mr. Wade says, 'the attachment is dissolved, and the action proceeds to judgment as an action *in personam.*' And, again: 'When a bond is given to pay whatever judgment may be rendered, and is approved and the property released, the attachment is dissolved, and it is

> no longer a proceeding *in rem,* and no plea in abatement traversing the ground of the attachment can be entertained.' 1 Wade, Attachm., pars. 183, 186. When, therefore, the undertaking was given, and by reason thereof the plaintiff released and surrendered the property to the defendant Dipascuale, the attachment was dissolved, and the undertaking took the place of such property, the action thereafter ceased to be *in rem.* There was, in fact, no attachment in existence to be dissolved at the death of the defendant, Dipascuale. Nor is it true, if there was a subsisting attachment, that the death of the defendant abates or dissolves it."

Since the amendment of 1907 to Section 308, Oregon Laws, there has been no decision in Oregon on the question as to whether or not the remedy given the plaintiff against the sureties in the original action is exclusive. The question has been, however, before the Courts of several states having statutes providing for summary entry of judgment against sureties on dissolution bonds, and nowhere has the narrow construction given Section 308 by the District Court herein been given to such statutes elsewhere.

The Iowa code provides:

> "Sec. 2994. If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties to be approved by the officer having the attachment, or after return thereof by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be

deemed an appearance of such defendant to the action.

Section 2995. Such bond shall be part of the record, and, if judgment go against the defendant, *the same shall be entered against him and sureties.*"

In State v. McGlothlin, 61 Iowa 312, 16 N. W. 137, a complaint was filed under the bastardy statute and property of one Jacob McGlothlin attached. He and the defendant, as surety, executed a bond in accordance with said Section 2994 and the attachment was released. Later judgment was entered against the defendant alone and an action was brought on the bond. The Court, in deciding this case had before it the precise question as to whether or not the statutory remedy was the exclusive means of enforcing payment of the judgment by the surety and held that it *was not* upon the same reasoning as we have herein pointed out, viz: that the obligation of the surety is not a statutory obligation.

The Court said:

"Because no such judgment was rendered against the defendant in the bastardy proceeding it is insisted none can be now, the argument being that the remedy on the bond is statutory and exclusive. In support of this proposition, Cole v. City of Muscatine, 14 Iowa 296, is cited. In that case it was held the plaintiff had no remedy at common law, and therefore he must pursue the remedy provided by statute. This is obvious. In the case at bar, we think, the plaintiff could have maintained an action on the bond at common law if none had been provided by statute. The latter, therefore, is merely an additional remedy. The bond it is true is statu-

tory, but the release of the lien of the attachment constituted a sufficient consideration, and no reason can be given why an action at common law cannot be maintained thereon, unless the statute is both mandatory and exclusive which is claimed. If this contention is adopted then the same judgment which is entered against the principal must be entered against the surety, although the latter might not be liable to the same extent as the principal; at least, a strict construction would require such a judgment. But, in our opinion, whether this is true or not, *the plaintiff is not confined to the statutory remedy.*"

To like effect are the following decisions:

"The present plaintiff might have had the bond returned forfeited, and an execution issued upon it as a judgment; but these rights were not exclusive of his right to sue, as he has in this case, on the bond itself."

Troy v. Rodgers (Alabama), 22 So. 486.

"The statute intends to give the party choice of two remedies; one by motion in aid of the original suit. The other by an independent action on the bond."

McDowell v. Morgan, 33 Mo. 555, 557.

"It is argued that the action is unauthorized and improper because of the act of Mar. 10, 1875 (Mansfield Digest, sec. 355), it was competent to have had the value of the property assessed and a judgment rendered against the sureties in the original action. And that the plaintiff having neglected to so proceed has lost all remedy upon the bond. But the summary remedy against the sureties, provided for by this statute, is evidently cumulative. It simply enacts that

> the assessment shall be made and judgment rendered against the sureties for the assessed value, upon demand of the plaintiff. If this is not done the plaintiff may still resort to his action upon the bond."
>
> Chapline v. Robertson, 44 Ark. 202.

The principle is stated in Corpus Juris as follows:

> "An action on a bond for the forthcoming of property or discharge of an attachment is not excluded by other and summary remedies provided for the enforcement of such liabilities."
>
> 6 C. J., par. 741, page 351.

Rules of practice are designed to provide an orderly method for the conduct of judicial procedure, but the astute attorney dearly loves to induce the Courts to hold so strictly and closely to an exact wording of a statute or a finely drawn analogy that an action designed to enforce an obligation of a defendant unwilling to fairly meet its terms may be dismissed before the issues thereof may be heard upon their merits. This case is a glaring example of a cause having been dismissed absolutely and entirely for no reason other than upon a highly technical question of whether or not a remedy other than the one chosen by the plaintiff was a proper one. The orderly course of judicial procedure in the State of Oregon does not require the narrow construction placed upon Section 308, Oregon Laws, by the District Court herein. This section was designed to facilitate the enforcement of bonds of this character and not to provide a means whereby sureties thereon

may escape liability in every instance where for one reason or another the Court may not enter judgment against the surety at the time of the entry of judgment against the defendant. Such construction, which will leave the plaintiff in the action and the sureties on the bond to have their differences adjusted upon their merits in an action brought upon the bond, in event any question between them is raised in an attachment suit, as to whether or not the bond is sufficient to warrant the summary entry of judgment, is one far better suited to have equity done between them, than is the construction given by the District Court to said Section 308 in this action. This construction must result in encouragement to sureties and their attorneys to seek, by quiddity and cavil, quillet and trick, to escape the performance of the promise of the sureties.

> "It is to be borne in mind that in cases of this character, technical defenses are not favored." (Bunneman v. Wagner, 16 Or. 433.)

We submit, that in a situation such as this, regardless of whether the undertaking be in accord with the exact provision of the statute, or otherwise, the broad construction which permits the plaintiff to pursue either the statutory remedy, or the common law remedy of an action at law, upon the bond, is the better and the sounder reasoning.

If the plaintiff may pursue its remedy against these defendants in an action at law, the jurisdiction of the action is vested in the District Court of the United States for the District of Oregon. It is al-

leged in the complaint that the defendants are each citizens and residents of the State and District of Oregon, and that the plaintiff is a National Banking Association, having its only place of business in California, and that it is a citizen and resident of the State of California.

That a National Bank is a resident and citizen of the State in which it conducts its business is established by the Supreme Court of the United States in Petri v. Commercial Bank, 142 U. S. 644, and Continental Bank v. Buford, 191 U. S. 119.

Wherefore, we respectfully submit that the judgment of the District Court herein should be reversed, and said Court directed to overrule defendants' demurrer to plaintiff's complaint.

Dated, San Francisco,
September 1, 1922.

FRANK W. STREET,
HORACE M. STREET,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

[Title of Court and Cause.]

OPINION.

Portland, Oregon, April 3, 1922.
10:00 A. M.

Bean, D. J.:

The case of the First National Bank of Antioch against McKean and others is an action on a bond given by the defendants for the discharge of an attachment. It seems that in November, 1919, the plaintiff in this action began proceedings in the State Court against one Thornberry for the sum of $12,000.00, and thereafter a writ of attachment was issued and Thornberry's property seized under that writ. Subsequently the defendant to this action gave a bond for the release of the attachment and it was released. Thereafter the plaintiff recovered a judgment against Thornberry, but failed and neglected to take any order or judgment against the bondsmen and subsequently brought an action in this Court upon the bond.

Now, the Oregon statute provides that an attachment may be dissolved upon the giving of a bond or undertaking to the effect that the sureties will pay the judgment recovered against the defendant, and Section 308 of the statute directs that where

property has been attached the Court in entering judgment shall order and direct a sale of the attached property, or, if the property attached shall have been released from attachment by reason of the giving of the undertaking provided in Section 311, the Court shall, upon giving judgment against the defendant or defendants, also give judgment in like manner and with like effect against the surety or sureties in such undertaking.

Now, then, under the statute the surety bond given for the release of the attachment stood in place of the attachment, and the statute provides in giving judgment for the plaintiff the Court shall also give judgment for the sureties, so that I take it it stands in exactly the same position as if the attachment had not been released or had remained in legal force and effect at the date of the judgment. The Courts of Oregon have held repeatedly, and I take it to be established rule, that any order determining the amount of the judgment and not ordering the sale of the attached property itself, any claim or lien is lost. This has been repeatedly held and reaffirmed in the 40th Oregon, 114, so that, inasmuch as the bond stood in place of the attachment and the statute (requiring?) a like judgment to be entered against the surety, it seems to me, under the Oregon decisions, that there is no alternative except for the Court to hold that this action cannot be maintained.

Therefore the demurrer will be sustained.

[Title of Court and Cause.]

OPINION.

Portland, Oregon, April 10, 1922.
10:00 A. M.

Bean, D. J.:

The case of First National Bank of Antioch against McKean was disposed of, or at least a demurrer to the complaint was passed upon last Monday. The Court, however, through inexcusable inadvertence, overlooked the fact that the plaintiff had been granted permission to file a brief. That brief has now been filed and I have examined it. The only point made in the brief that was not disposed of on Monday last is that the bond or undertaking given by the defendants was not a statutory bond because it provides that in case the plaintiff recover judgment the defendant will pay the same, or, in default thereof, the sureties will on demand do so, and it is claimed that this is not a statutory bond but a common law bond and therefore the plaintiff was not required under the statute to take the judgment against the sureties at the same time that plaintiff took judgment against the defendants. But the bond was given for the purpose of obtaining a discharge of an attachment. It is in effect a statutory bond, and such was the holding of the Court of Appeals in this District in the case of Ebner v. Heid, 125 Fed. 680, in which case the Court had occasion to construe and consider a bond in language almost exactly the same as the one now in question, and therefore I take it that the demurrer be well taken, notwithstanding the point made by the plaintiff in its brief.